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No. 96-8837
Donald E. Cleveland,
Enrique Gray-Santana
Petitioners,

v.

United States of America,
Respondent

No. 96-1654
Frank J. Muscarello,
Petitioner,

v.

United States of America,
Respondent

On Writs of Certiorari to the United States
Courts of Appeals for the First and Fifth Circuits

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

DANIEL KANSTROOM
Counsel of Record
KENT GREENFIELD
Boston College Law School
885 Centre Street
Newton, MA 02159
(617) 552-0880
(617) 552-3167

DAVID PORTER
801 K Street,
10th Floor
Sacramento, CA 95814
(916) 498-5700

KYLE O'DOWD
1612 K Street, N.W.,
Suite 1400
Washington, D.C. 20006
(202) 822-6700

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Black's Law Dictionary (6th Ed. 1990) 2, 5, 6

Clark D. Cunningham & Charles J. Fillmore, Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm," Wash. U. L.Q. 1159, 1198-1203 (1995) . 14

Federal Information Systems Corporation, Federal News Service, Section: In the News, Prepared Statement of Kevin DiGregory; May 8, 1997 18

Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process (William N. Eskridge, Jr. & Phillip P. Frickey eds. 1994) 3

Note & Comment, The Aftermath of Bailey v. United States: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?, 5 J. L.& Pol'y 679 (1997) 4

Sarah Newland, The Mercy of Scalia: Statutory Construction and the Rule of Lenity, 29 Harv. C.R.-C.L. L. Rev. 197 (1994) 22

Webster's II New College Dictionary (1995) 6

William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991) 23

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S1976 (daily ed. March 13, 1996) 15, 16

S7762, 7764-5 (daily ed. July 11, 1996) 16

S12390 (daily ed. October 3, 1996) 15, A-1

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S405 (daily ed. January 12, 1997) 17

INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives is to ensure the proper administration of criminal justice, and to promote fair and consistent application of sentencing laws.

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. FAMM argues that such laws, of which 18 U.S.C. § 924(c) is a prominent example, are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM does not contend that crime should go unpunished, but that the punishment should fit the crime.

I. SUMMARY OF ARGUMENT

The two cases consolidated for review by this Court are indicative not only of a split in the Circuits but of a pervasive confusion over the meaning of a simple phrase--"carries a firearm" -- contained within 18 U.S.C. § 924(c)(1).

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[1]In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. The petitioners and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

Notwithstanding the extensive linguistic, etymological, and logical gymnastics that have engaged the Courts of Appeals, this is a phrase with an obvious ordinary and natural meaning. In the relevant context of firearms, to carry means, simply, to bear upon one's person.

This contextual definition, listed under "carry arms or weapons" in BLACK'S LAW DICTIONARY 214 (6th ed. 1990), is the first and most natural meaning ascribed to the phrase by the drafters of § 924(c)(1) and other related legislation, and by this Court. *See Smith v. United States*, 508 U.S. 223, 236 (1993) ("so too would a defendant 'carry' the firearm by keeping it on his person"). Further, it fits best with this Court's instruction in *Bailey v. United States*, 116 S. Ct. 501 (1995), that each statutory term in § 924(c)(1) must be construed to have a separate meaning. Similarly, it avoids confusing overlap with many other federal statutes that employ these related terms. The best way to distinguish "carry" from "use," "transport," or "possess" is to confine the term to its ordinary and natural meaning. Such a reading makes perfect sense because as one court recently put it, "criminals who pack heat are obviously much more dangerous than those who do not." *United States v. Foster*, ___ F.3d. ___ 1998 WL 2521 at *1 (9th Cir. 1998).

Moreover, the simple definition of "carry" proposed by *amici* is easy to apply, and will discourage the lower courts from stretching statutory text by policy-driven teleological reasoning. A clear definition of "carry" will properly complete the interpretive enterprise begun by this Court in *Bailey*. Finally, the ordinary and narrow construction of § 924(c)(1) best comports with the Rule of Lenity.

II. ARGUMENT

A. INTRODUCTION

Two years ago, in *Bailey v. United States*, ___ U.S. ___, 116 S.Ct. 501 (1995), this Court addressed two issues that had troubled lower courts interpreting 18 U.S.C. § 924(c)(1),[2] a deceptively simple statute that, "has been the source of much perplexity in the courts." 116 S.Ct., at 505. The first issue was the specific meaning of the statutory phrase, "uses . . . a firearm." This Court's specific answer to that question was that the term should be interpreted quite narrowly: "the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime." *Id.* at 509.

The second issue was perhaps less straightforward, but *Bailey* offered genuine guidance in how to resolve it. That issue is one of method -- how should courts interpret the potentially ambiguous terms "use" and "carry" in a criminal statute? A pessimist might suggest that the current split in the Circuits reaffirms the truth of what Justice Scalia has recently conceded is "a sad commentary": "that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Phillip P. Frickey eds. 1994), cited in ANTONIN

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[2] 18 U.S.C.§ 924(c)(1) provides in relevant part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

SCALIA, ET AL. A MATTER OF INTERPRETATION 14 (1997). Closer analysis of *Bailey*, however, offers a clear path through the thicket. Indeed, proper application of quite basic methods of statutory construction compels the conclusion that the lower courts have simply misunderstood that, especially in the context of criminal statutes, "statutory construction means...that the Court can *construe* statutes but not that it can *construct* them." *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) (dissent of Clark, J., joined by Harlan, Stewart, and White, JJ.).

There may very well be compelling public policy reasons to punish harshly those who transport, or possess, even constructively, firearms, "during and in relation to any crime of violence or drug trafficking crime." It appears that *post-Bailey*, the lower federal courts have been swayed by just such considerations. *See United States v. Miller*, 84 F.3d 1244, 1259 (10th Cir. 1996) (discussing numerous cases from the First, Second, Sixth, Seventh, Ninth, and Eleventh Circuits that applied a broader interpretation of "carry a firearm" following *Bailey*); *see also* Note & Comment, *The Aftermath of Bailey v. United States: Should Possession Replace Carry and Use Under 18 U.S.C. § 924(c)(1)?*, 5 J. L.& POL'Y 679, 697 (1997) ("It is clear that after *Bailey*, the Second Circuit, along with many others, is defining 'carry' more broadly."). Policy justifications, however, cannot legitimize judicial interpretations that are unsupported by the language of the statute, its context, and its history.

It is not surprising that the Courts of Appeals are as hopelessly tangled and divided over the proper meaning of "carries a firearm" as they are. As in the years before *Bailey* when some of the lower courts used § 924(c)(1) as a cudgel, expanding "use a firearm" beyond the reasonable, the lower courts have simply exceeded their interpretive charge. Their lack of consensus is the inevitable result of unwarranted straying from the ordinary, core meaning of the phrase, in the process ignoring venerable principles for the construction of

criminal statutes.

B. THE ORDINARY AND NATURAL MEANING OF THE PHRASE "CARRY A FIREARM" IS LIMITED TO THE PERSON

This Court has been clearer about nothing than that the starting point of statutory interpretation must be the language of the statute, which is to be interpreted according to "its 'ordinary or natural' meaning." *Bailey*, ___ U.S., at ___, 116 S. Ct., at 506 (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). The widely divergent etymological conclusions of the Courts of Appeals could indicate that a strict dictionary-based solution to this problem is elusive. One difficulty is that the English word "carry" seems to be susceptible of a number of "ordinary and natural" meanings. It can mean "[t]o wear, bear . . . upon the person or in the clothing or in a pocket, for the purpose of use . . . ." BLACK'S LAW DICTIONARY 214 (6th ed. 1990). Or, as the Court of Appeals for the First Circuit has held, "carry" could essentially mean "transport": "moving to a location some distance away . . . . by car or cart . . . in ref[erence] to ...loads on trucks, wagons, planes, ships, or even beasts of burden." *Cleveland v. United States*, 106 F.3d 1056, 1066 (1st Cir. 1997) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 343 (3d ed. 1971)). *See also id.*, 106 F.3d at 1068 ("the ordinary meaning of the term 'carry' includes transport by vehicle"). Or it could even mean to communicate (as in "carry a tune"), have in stock (as when a store "carries inventory"), prolong (as in a lesson that is "carried over" to the next day), or to be infectious (as in "carrying a disease").

But the presence of multiple meanings in a dictionary hardly creates a dilemma, in itself, since a trip to the

dictionary should not be undertaken with a mind cleansed of any knowledge of context. As this Court said in *Bailey*, statutory language "draws meaning from its context, and we will look not only to the word itself." 116 S.Ct., at 505. *See also id.* at 506 ("[T]he meaning of statutory language, plain or not, depends on context.") (citations omitted). Thus, the phrase "carries a firearm" has a more limited, more specific meaning than the word "carry" has in general. We know this because we recognize that the interpretive task is not to determine the meaning of the word "carry" in general but only its meaning in relation to a firearm.

Of the principal dictionary definitions of "carry," only one specifically links the verb with the object -- a firearm -- relevant to these cases. Black's Law Dictionary, in fact, defines not only the verb but the entire phrase "carry arms or weapons." This phrase is best seen as essentially a legal term of art signifying, as Black's puts it: "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY, *supra*, at 214. *See also* WEBSTER'S II NEW COLLEGE DICTIONARY, at 170 (1995) (carry means "[t]o have or keep on one's person [*carry* a gun]"). That is, "carry a firearm" means, in Judge Kozinski's colorful phrase, "to pack heat." *United States v. Foster*, ___ F.3d. ___, 1998 WL 2521, *1 (9th Cir. 1998). It does not mean to have available, or to store, or to transport, or to possess. The meaning is simple and clear: to wear or bear on the person.

This Court's own passing reference, in *Bailey*, to the phrase "carry a firearm" underscores that the core, "ordinary and natural" meaning of the phrase is "on the person." As the Court explained the difference between "using" and "carrying" a firearm, the Court described carrying in a narrow way. "[A] firearm can be carried without being used,

e.g., when an offender keeps a gun *hidden in his clothing* throughout a drug transaction." 116 S.Ct., at 507 (emphasis added). Similarly, in *Smith v. United States*, 508 U.S. 223, 236 (1993), the Court made another passing reference to "carry a firearm" and in doing so revealed the core, "ordinary and natural" meaning of the phrase.

> Just as a defendant may 'use' a firearm within the meaning of § 924(c)(1) by trading it for drugs or using it to shoot someone, so too would a defendant 'carry' the firearm *by keeping it on his person* whether he intends to exchange it for cocaine or fire it in self-defense.

508 U.S., at 236 (emphasis added).

The "ordinary and natural" meaning Black's Law Dictionary ascribes to "carry a firearm" mandates that convictions in both the instant cases should be overturned. A firearm transported in a car's trunk or in a glovebox is not being carried on the person. That much is clear.[3] Given the direct relevance of this specific, legal definition, this Court should simply stop here. The text is clear, and its "ordinary and natural" meaning, in context, is clearly set out in the most relevant legal dictionary. There is little reason to excavate further, and the courts that have done so have reaped only confusion.

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[3]Nor is a firearm transported in a trunk or glovebox being carried "about the person." The best meaning of that phrase connotes the possession of a firearm in a backpack, or case, or coat pocket or some other container that is itself on the person or held by the person. *See, e.g., Diffey v. State*, 86 Ala. 66, 5 So. 576 (1888); *Avery v. Commonwealth*, 223 Ky. 248, 3 S.W.2d 624 (1928) (in receptacle attached to or carried by the person).

C. OTHER INTERPRETIVE TOOLS SUPPORT THE PROPOSITION THAT "CARRY A FIREARM" MEANS "ON THE PERSON"

If the Court wishes to peek behind the curtain of "ordinary and natural" meaning, the equation of "carry a firearm" with "on the person" is bolstered further.

1. The Placement and Purpose of "Carry a Firearm" in the Statutory Scheme Confines Its Meaning to the Person

The "ordinary and natural" meaning of "carry a firearm" set out in Black's Law Dictionary fits well within a more coherent and more comprehensive reading of the entire statutory scheme. This Court made very clear in *Bailey* that since Congress used two distinct terms in § 924(c)(1) they must each be construed to have a distinct meaning. *See* 116 S.Ct., at 506 ("we read § 924(c)(1) with the assumption that Congress intended each of its terms to have meaning"). There must thus be a way to use a gun without carrying it and, conversely, it should be possible to carry a gun without using it. *Bailey*, 116 S. Ct., at 507.

But it is also important to realize that although they are distinct, "use" and "carry," in this context, are cousins. The Court assumes that Congress picks its words with care. As the Latin maxim puts it, *noscitur a sociis* -- "it is known from its associates." BLACK'S LAW DICTIONARY 956 (rev. 5th ed. 1979). In this statute, it is apparent that "use" and "carry" were linked so that it was reasonable to use those words and no others. Thus, we can gain insight into the best meaning of "carry a firearm" by looking at the meaning of "use a firearm."

In *Bailey*, this Court made clear that "use a firearm" required some active and direct link to the underlying crime. Congress chose the phrase "use a firearm" rather than "have available for use" or "intend to use" in order to emphasize the requirement that the employment of the firearm have an

immediate and close connection with the underlying crime. *See* 116 S.Ct., at 507 ("In § 924(c)(1), . . . liability attaches only to cases of actual use, not intended use."). *Bailey*, then, interpreted "use a firearm" quite narrowly.

"Carry a firearm" should be similarly interpreted. That is, the best reading of the statute is that Congress intended "carry a firearm" to be akin to "use a firearm" while offering something that the latter phrase did not. The ordinary and natural meaning of "carry a firearm" suggested by Black's Law Dictionary satisfies this condition. As the definition itself makes clear, the meaning of "carry a firearm" is directly linked to using a firearm: "[t]o wear, bear, or carry [] upon the person or in the clothing or in a pocket, *for the purpose of use*, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." BLACK'S LAW DICTIONARY 214 (6th ed. 1990) (emphasis added). Congress, to put it metaphorically, decided that the center of the statutory target was the link between the underlying crime and a firearm's "active employment," *Bailey*, 116 S.Ct., at 508, and that the next concentric circle outside the bull's eye was to have a firearm on one's person so as to have it available immediately for use. This reading would thus link "carry a firearm" to "use a firearm" by the immediacy to the perpetrator of the underlying crime that both phrases require. It would be anomalous indeed for "use a firearm" to be interpreted as containing an immediacy requirement, as this Court held in *Bailey*, and for "carry a firearm" to be construed as containing a requirement of only the thinnest reed of a connection with the underlying crime.

Moreover, this narrow reading of "carry a firearm" best fits within the most likely legislative purpose behind § 924(c)(1). As Judge Kozinski has explained, "[c]riminals who pack heat are obviously much more dangerous than those who do not." *Foster*, ___ F.3d, at ___, 1998 WL 2521, at *1. *See also id.* at *4 ("Using or carrying guns makes those crimes

more dangerous. A drug dealer who packs heat is more likely to hurt someone or provoke someone else to violence.") Section 924(c) provides for penalties that are among the harshest of any found in all of § 924. *See* Pet. Br. at 25. It is reasonable, then, to assume that what Congress sought to make unlawful was the closest of connections between firearms and other crimes.

This reading of "carry a firearm," which takes its cue from the narrow meaning of "use a firearm" and the likely legislative focus on the immediate connection between the underlying crime and the firearm itself, has an additional virtue. This virtue is that it separates the meaning of "carry a firearm" from "possess a firearm," "transport a firearm," and "store a firearm." In *Bailey*, this Court made clear that "use" must mean something different from "possess" in the context of § 924(c). *See* 116 S.Ct., at 506. The Court reached this conclusion because of "the frequent use of the term 'possess' in the gun-crime statutes to describe gun-related conduct." *Id.* The same reasoning would hold true, of course, with regard to "carry a firearm." The narrow, ordinary and natural meaning of "carry a firearm" that limits its meaning to "on the person" ensures that it will not be confused with "transport," which also appears frequently in gun-crime statutes. *See, e.g.,* 18 U.S.C. § 926A.[4] Moreover, as *Bailey* made clear, both "possess" and

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[4]The Congressional understanding that "carries a firearm" differs from "transports a firearm" is perfectly illustrated by 18 U.S.C. § 926A, which was enacted into law in 1986 and which provides in relevant part,

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to *transport* a firearm for any lawful purpose from any place where he may lawfully *possess and carry* such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle:
>
> Provided, that in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

(emphasis added).

See also 49 U.S.C. § 46505 (1997) ("Carrying a weapon or explosive on an aircraft") (distinguishing "to carry a dangerous weapon" in sub-section (d)(2), from "transporting a weapon" in sub-section (d)(3)).

"carry a firearm" must mean something more than "storage": "A defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession." 116 S.Ct., at 508. The narrow definition of "carry a firearm" establishes the best and clearest distinction between that phrase and "possess," "transport," and "store."

2. The Ordinary and Natural Meaning of "Carry a Firearm" Is Simple and Easy to Apply

One of the reasons that this Court held in *Bailey* that "use a firearm" means "active employment" of a firearm, was that alternative meanings of the phrase made for confusing and inconsistent application. This same rationale supports a reading of "carry a firearm" as equivalent to "on the person."

If the meaning of "carry a firearm" is uncoupled from its traditional link to the body, then the interpretation of the phrase "carry a firearm" will turn on manipulable and difficult-to-define conceptions of accessibility and proximity. With such a loose test, as this Court recognized in *Bailey,* courts eventually fall down a slippery slope toward making unlawful

under § 924(c) practically all firearms possession in connection with a crime of violence or drug trafficking crime. "[The] proximity and accessibility standard provides almost no limitation on the kind of possession that would be criminalized; in practice, nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard, 'thereby eras[ing] the line that the statutes, and the courts, have tried to draw.'" *Bailey*, 116 S.Ct., at 506 (quoting *United States v. McFadden*, 13 F.3d 463, 469 (1st Cir. 1994) (Breyer, C.J., dissenting)).

Even if "carry a firearm" is expanded to mean close to -- but not on -- the person, virtually unresolvable line drawing dilemmas result. Again, as this Court noted in *Bailey*, "some might argue that the offender has 'actively employed' the gun by hiding it where he can grab and use it if necessary." 116 S.Ct., at 508. Similar arguments could be made with regard to "carry a firearm." These arguments should be answered as the Court answered the analogous assertion in *Bailey*. They "create an impossible line-drawing problem. How 'at the ready' was the firearm? Within arm's reach? In the room? In the house?" 116 S.Ct., at 509. It would be senseless indeed to establish, on the one hand, a clear, narrow rule for "use" that avoids messy line-drawing difficulties of determining accessibility and proximity and then, on the other hand, to adopt a rule for "carry" that creates those same problems. An adoption of the narrow, ordinary and natural meaning of "carry a firearm" avoids these difficulties.

3. The Legislative History Supports the Meaning of "Carry a Firearm" as Confined to the Person

It has been noted recently that there is "mercifully little legislative history on 'carry.'" *Foster*, ___ F.3d, at ___, 1998 WL 2521, at *4, n.8. Nevertheless, the legislative history that does exist further shows that the "ordinary and natural"

meaning of "carry a firearm," as suggested by Black's Law Dictionary, was what was enacted by Congress in § 924(c)(1).

While legislative history from § 924(c)'s initial passage is not particularly illuminating, important insights can be gained from the history of the 1984 revisions, which came as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §1005(a), 98 Stat. 2138-2139. In particular, Congress substituted the phrase "crime of violence" for the term "felony" in order to include violent misdemeanors and to exclude non-violent felonies. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 313 n.9 (1983). Additionally, Congress merged the "uses" and "carries" prongs of the statute, deleted the requirements that the firearm be used "to commit" the offense or the weapon be carried "unlawfully," and imposed instead the "during and in relation to" requirement with respect to both "uses" and "carries" liability.[5] These changes were substantial but there is absolutely no indication that the revision of the statute included a change in the understanding that carrying a firearm means to bear it on one's person. Indeed, in a footnote immediately following its explanation of the enhanced sentencing provision, the Committee Report observed:

> Evidence that the defendant had *a gun in his pocket* but did not display it, or refer to it, could nevertheless support a conviction for "carrying" a firearm in relation to the crime if from the

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[5]The 1984 amendment to § 924(c) read in pertinent part as follows:

> Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years.

Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138, 2139.

> circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape . . . ."

S. Rep. No. 89-255, at 314 n. 10 (1983), reprinted in 1984 U.S.C.C.A.N. 3492 n. 10 (emphasis added).

Various unsuccessful attempts to amend § 924(c) over the course of the past ten years show that "carry" is generally understood both to mean something substantially more narrow than possession and, most specifically, to mean borne by a person. Although failed attempts at legislative change are in general an obviously weak indicator of legislative intent, they do seem to indicate a widely-accepted background understanding of the meaning of "carry" in this context. *See United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1985) (Marshall, C.J.) ("where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived"). A 1989 bill, for example, was aimed at "broadening" § 924(c) "to reach persons who have a firearm ... available during the commission of certain crimes, even if the firearm is not carried or used," as where "a loaded firearm is found in the dresser drawer of an apartment which the defendant utilizes in connection with his drug dealings." *See, e.g.*, S1225, 101st Cong., 1st Sess. §113 (1989) (proposing to replace "uses or carries a firearm" with "uses, carries, or *otherwise possesses* a firearm") (emphasis added); S1256, 103d Cong. 1st Sess. § 1007 (1993)(same); S2305, 102d Cong.. 2d Sess. §401 (1992) (proposing to replace "uses or carries" with "knowingly uses, carries, or otherwise possesses"). *See generally,* Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretations of "Use a Firearm,"* 73 WASH. U. L.Q. 1159, 1198-1203 (1995) (describing and analyzing Congress's post-1988 efforts to expand statute to cover possession of firearm). Examples cited in debate over these bills are instructive as to the understanding of what it means to carry a firearm: "The

requirement that the firearm's use or possession be 'in relation to' the crime would preclude its application in a situation where its presence played no part in the crime, such as a gun *carried in a pocket* and never displayed or referred to in the course of a pugilistic barroom fight." S. Rep. No. 225, 98th Cong., 2d Sess. 314 n. 10 (1983) (emphasis added), reprinted in 1984 U.S.C.C.A.N. 3182, 3492 n.10. The passage also contains the following statement:

> Evidence that the defendant had a gun in his pocket but did not display it, or refer to it, could nevertheless support a conviction for 'carrying' a firearm in relation to the crime if from the circumstances or otherwise it could be found that the defendant intended to use the gun if a contingency arose or to make his escape.

S. Rep. No. 225, at 314 n.10, reprinted in 1984 U.S.C.C.A.N. at 3492.

More recent debates and testimony demonstrate even more clearly the virtual consensus that "carry" has a substantially more narrow meaning that "possess." For example, various legislative proposals have been made to expand the reach of § 924(c)(1) beyond carry to possession. *See e.g.*, S. 1612, "A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes" (providing for a ten year mandatory minimum sentence for "any criminal possessing a gun during and in relation to the commission of a violent or drug trafficking crime.") 142 Cong. Rec. S1976 (daily ed. March 13, 1996) (passed by the Senate on October 3, 1996, as "A bill to broaden the scope of certain firearms offenses, and for other purposes"). *See* Appendix. 142 Cong. Rec. No. 141, S12390; *see also* S.1945, "A bill to broaden the scope of certain firearms offenses" (described by its sponsor, Sen. DeWine as designed to "cover all circumstances in which a drug dealer or violent criminal is caught with a firearm" [by adding the language]

"uses or carries a firearm...or has a firearm in close proximity at the time of arrest or at the point of sale of illegal drugs") 142 Cong. Rec. S7762, 7764-5 (daily ed. July 11, 1996).

The understanding of the significant difference between "carry" and "possess," was demonstrated by the following colorful argument made by Sen. Helms, the sponsor of S. 1612:

> "As a result of the Court's [*Bailey*] decision, any thug who hides a gun under the back seat of his car, or who stashes a gun with his drugs, may now get off with a slap on the wrist . . . I believe that *mere possession* of a firearm, during the commission of a violent felony--even if the weapon is not actively used--should nonetheless be punished . . ."

142 Cong. Rec. S1976-7 (daily ed. March 13, 1996).

Although unsuccessful in his attempts to amend § 924(c)(1) in 1996, Sen. Helms, in 1997, spoke in support of S. 43, "A bill to throttle criminal use of guns," which provided that a 5-year mandatory minimum sentence shall be imposed upon any criminal *possessing* a gun during and in relation to the commission of a violent or drug trafficking crime.[6] The Senator was equally clear that "carry" was much more narrow than "possess."

> The bill I am introducing today will correct the Supreme Court's [*Bailey*] blunder, and it will crack down on gun-toting thugs who commit all manner of unspeakable crimes . . . violent felons who *possess* firearms are demonstrably

[6]If the criminal were to fire the weapon, the mandatory penalty would be elevated to 10 years. If there were a killing during the crime, the punishment would be life imprisonment or the death penalty.

> more dangerous than those who do not. . . . Current Federal law provides that a person who, during a Federal crime of violence or drug trafficking crime, uses or carries a firearm shall be sentenced to 5 years in prison . . . . But along came the Supreme Court's unwise decision thwarting prosecutors' effective use of this statute. The Court . . . interpreted the law to require that a violent felon actively employ a firearm as a precondition of receiving an additional 5-year sentence. The Court held that the firearm must be brandished, fired or otherwise actively used; so if a *criminal merely possesses* a firearm, but doesn't fire or otherwise use it, he escapes the additional 5 year penalty.

143 Cong. Rec. S405 (daily ed. January 21, 1997) (emphasis added).

Sen. Helms, of course, does not speak for the entire Congress, or even necessarily the Senate. This Court, however, should take note of the fact that the entire Congress appears to agree that the current statute does not punish the functional equivalent of possession of a firearm and that any expansion of the meaning of "carry" in § 924(c)(1) should be a legislative task. Bills that have passed both the House and the Senate in the past two years further show a consensus that the phrase "carry a firearm" is significantly narrower than "possess a firearm." *See* Appendix (reprinting relevant portions of bills).

Discussion over why it might be necessary to add a possession prong to § 924(c)(1) has also been surprisingly probative of how "carry" is generally understood. Indeed, even testimony by federal prosecutors has confirmed the general proposition that "carry" has a significantly narrower meaning than "possess." On May 8, 1997, Kevin DiGregory, Deputy

Assistant Attorney General, General Criminal Division of the Department of Justice, testified before the Senate Committee on the Judiciary on the general subjects of *Bailey* and 18 U.S.C. § 924(c). Federal Information Systems Corporation, Federal News Service, Section: In the News, Prepared Statement of Kevin DiGregory; May 8, 1997. Mr DiGregory described various legislative proposals then pending in the Senate.[7]

In later testimory the same day, both Mr. DiGregory and another witness, Walter C. Holton, Jr., United States Attorney for the Middle District of North Carolina argued that the substitution of the word "possess" would eliminate the need for "use" and "carry." More specifically, though, the following dialogue indicated the basic difference between "carry" and "possess":

> Sen. Sessions: ...Mr. Holton, I think if you were prosecuting a case and the person actually carried the gun during the drug offense, you would charge that and possess too. You'd charge carry and possess. Perhaps if it was under the seat of the car, you would probably charge it just possess. Do you think?
>
> Mr. Holton: I think that's a fair distinction--

Id. at 23.

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[7]The first, S. 362, introduced by Senators Leahy and Biden and supported by the Administration, simply substituted the phrase "possess a firearm" for "uses or carries". In contrast, the formulation of S.43 and S.3, proposed by Senators Helms, Hatch and DeWine, added the term "possess" to "uses or carries." Finally, S.15, also proposed by Senators Leahy, Biden and others, would also substitute "possesses" for "uses or carries" but it also change "in relation to " to "in close proximity to." *Id.* at 2.

D. THE ATTEMPT BY THE COURTS OF APPEALS TO EXTEND THE MEANING OF "CARRY" BEYOND THE PERSON HAS LED TO UNNECESSARY CONFUSION AND COMPLEXITY

In comparison to the natural, reasonable reading of "carry a firearm" as meaning "on the person," it is worth considering the mistaken reading of the statute performed by most of the Courts of Appeals. Rather than depending on the core, ordinary and natural meaning of "carry a firearm," some Courts of Appeals have equated the terms "carry" and "transport." They have achieved this result by, first, divorcing "carry" from its relevant object--"firearm." They then rely upon what appears to be a teleological, policy-based, and arbitrary choice among dictionary definitions. *See, e.g., Cleveland*, 106 F.3d at 1067 (holding that Black's "on the person" definition is "inapposite" because of doubts that Congress would mean to exclude defendant who "transports" the gun in his car). The first part of this method has been expressly disavowed by this Court. *See Deal v. United States*, 508 U.S. 129, 133 (1993) (criticizing "the regrettable penchant for construing words in isolation.") The second is patently improper.

The feat of interpretive legerdemain tends to lead to a focus on movement because the severance from plain meaning necessitates a point of distinction (other than the body) between "carry" and "possess." But the recourse to movement leads to absurd results. It is absurd, for example, to conclude that Congress intended to punish a person who sells drugs while holding a gun in his jacket pocket while walking but not to punish him if he stands still. The danger that Congress sought to address was not that of movement of weapons. As noted above, "transportation" is dealt with elsewhere in any event. *See, e.g.*, 18 U.S.C. §§ 922(a)(1)(A), 922(a)(1)(B), 922(a)(2), 922(a)(3), 922(a)(4), 922(a)(5), 922(e), 922(f)(1), 922(h),

922(i), 922(j), 922(k), 922(n), 924(b), 925(a)(1), 925(a)(2), 925(a)(4). *See also Foster*, ___ F.3d, at ___, 1998 WL 2521, at *3. Rather, the focus of § 924(c)(1) was clearly the close connection between firearms and persons committing crimes of violence or drug trafficking. Movement was not the key.

This can be illustrated with a couple of straightforward hypotheticals. An engineer in the engine of a train could not reasonably be said to be "carrying" a firearm he has stored in a compartment in the caboose a half-mile away. Nor could a captain standing on the bridge of an ocean liner be said to be "carrying" a firearm he has stashed among his belongings in his quarters several decks below. In both cases, the person possessing the firearm is moving it along with him. In both cases, the firearm is being "move[d] while supporting," is being "move[d] an appreciable distance without dragging," and is being "sustain[ed] as a burden or a load and [brought] along to another place." *Cleveland*, 106 F.3d, at 1066 (quoting WEBSTER'S THIRD, *supra*, at 343). Yet it is obviously inconsistent with the "plain meaning" of "carry" in this specific context to sweep these hypotheticals within its purview. The carry-as-transportation logic of the First and Fifth Circuits in the cases below would render both the ship captain and the train engineer criminally liable under § 924(c)(1) if they committed a relevant underlying crime in the train engine or on the ship's bridge, even if the firearms were a great distance away but still on the same moving vehicle. To impose liability in such a situation is incongruous with the purpose of the statute.

The incorrect focus on movement also tends to implicate yet another complicated requirement--that of "immediate accessibility." Some courts have seemed to rely exclusively on this concept, *see United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir. 1996) (concluding that the "ordinary and natural" meaning requires immediate availability for use), while others have combined it with the transport element. *See*

United States v. Ramirez-Ferrer, 82 F. 3d 1149, 1154 (1st Cir. 1996); *cert. denied*, 117 S. Ct. 405 (1996) (loaded gun on a boat within "easy reach" held to be carried); *United States v. Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir. 1996) (finding gun transported in a vehicle and "within reach and immediately available for use" sufficient evidence of "carrying"); *but see United States v. Mitchell*, 104 F.3d 649, 653 (4th Cir. 1997) ("plain meaning" does not require that firearm be readily accessible). As noted above, however, the problem of accessibility only arises if one strays from the core (on the person) definition. The best way to avoid it is simply to rely on the plain meaning of the statutory term.

Accessibility provides a possible way to *expand* the plain and ordinary meaning but, like mobility, it raises significant problems. Most obviously, it creates a line-drawing problem between "carry" and "possess." A gun on a table in the living room is perhaps immediately accessible and is certainly possessed. It would not, however, ordinarily be thought of as "carried."

Those courts that have postulated locomotion or immediate accessibility as core meanings of "carry a firearm" have, so to speak, put the cart before the horse. To the extent that these concepts may inhere in the phrase "carry a firearm" it is only because the core meaning of that phrase is "on the person."

One additional factor argues against an adoption of the movement-based construction of § 924(c)(1). Under such a reading, "carry a firearm" would mean something different when a defendant is in his house, or on the sidewalk, or in a store or park or office building, from when he steps into a car or other vehicle. *See Muscarello*, 106 F.3d at 639 ("[W]e observe that what constitutes 'carrying' under § 924(c) when the firearm is possessed in the motor vehicle differs substantially from what constitutes carrying a firearm in a non-vehicle situation."). Outside the vehicle, movement or

potential movement is not part of the definition. Inside the car, movement becomes the touchstone. Not only is such a result messy, it flies in the face of any reasonable method of statutory interpretation -- why would "carry" mean something different inside a car any more than "use" would?

The carry-as-transportation construction also creates anomalies. A defendant who sold drugs in his living room, with a gun in an adjacent room but out of sight, would not be liable under this construction of § 924(c)(1). Yet if the defendant sold drugs from a car, the carry-as-transportation reading of § 924(c) would make unlawful the presence of a firearm that was, say, in the trunk, even if it was no more accessible to the defendant in the driver's seat than the gun in the adjacent room was to the defendant in the living room. The ordinary and natural reading of "carry" to mean "on the person" would be the same inside or outside a car, on board a ship or on shore, and inside one's abode or outside on the sidewalk.

E. A NARROW READING OF "CARRY A FIREARM" IS REQUIRED BY THE RULE OF LENITY

Even if the Court believes that the sum of these arguments do not remove all uncertainty with regard to the best reading of "carry a firearm" in § 924(c)(1), there should be little doubt that the narrow "on the person" reading is a principal contestant. Not only does it comport with the most relevant dictionary meanings, it also makes sense within the statutory scheme, is easy and simple to apply, and is most closely aligned with evidence from the legislative history. In such a situation, any remaining doubt that this Court should adopt a narrow reading should be resolved by the Rule of Lenity.

This "venerable rule," *Smith*, 508 U.S., at 239, requiring that "penal laws are to be construed strictly, is perhaps not

much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997) ("The rule of lenity is almost as old as the common law itself."). As Chief Justice Marshall explained, the Rule "is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department." *Id.* Thus, the Rule "insists that only the legislature define crime, and that the definition be clear and precise before courts may impose punishment." Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 201 (1994). The Rule also emphasizes that the accused should receive fair warning that her conduct falls within the statutory prohibition. *Id.* As Justice Holmes taught, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *See also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 413-14 (1991) (The Rule of Lenity "serves the representation-reinforcing goal of protecting a relatively powerless group [people accused of committing crimes] and the normativist goal of injecting due process values of notice, fairness, and proportionality into the political process.").

Importantly, the Rule of Lenity provides a check on judicial activism. It is often tempting for courts to expand the reach of a criminal statute, ever so slightly, in order to cover the conduct of a defendant whose conduct falls just outside the express language of a criminal statute. Not holding responsible someone just barely beyond the express language may seem unjust, or illogical. Indeed, the courts interpreting § 924(c)(1) might be rightly charged with such well-intentioned, but misguided, expansion. *See, e.g., United States v. Cleveland*, 106 F.3d 1056, 1067 (1st Cir. 1997) ("We strongly doubt . . .

that Congress . . . meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction."). As Chief Justice Marshall explained, the Rule of Lenity seeks to guard against this very natural impulse:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

Wiltberger, 18 U.S., at 96.

The Court's more recent pronouncements make it clear that the Rule of Lenity continues to hold an important place in the Court's interpretive practice. This Court explained in *United States v. Bass*, 404 U.S. 336 (1971) that "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is *clear and definite*.' *Id.* at 347 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (emphasis added)). The Court thus harkened back to Justice Frankfurter's language in *C.I.T.*, in which he explained that the Rule of Lenity should apply when a statute "cannot be said to be decisively clear on its face one way or another." 344 U.S., at 224. *See also Bell v. United States*, 349 U.S. 81, 84 (1955) (Rule of Lenity should apply "if Congress does not fix the punishment for a federal offense clearly and without ambiguity."); Also in *Bass*, this Court depended on the Rule of Lenity because Congress had not "'plainly and unmistakably'" spoken. 404 U.S., at 348 (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917). Applied to the instant case, this language should be extremely helpful. Even at best, the government's reading of § 924(c) can hardly be said to be "clear and definite." Nor can, even at best,

the government's construction be fairly said to be "decisively clear" or "plain[] and unmistak[en]."

To be sure, this Court has stated that the Rule of Lenity does not hold Congress to an impossible level of specificity. *See* SCALIA, *supra*, at 28 ("Every statute that comes into litigation is to some degree 'ambiguous.'"). In *Smith*, for example, this Court stated that the Rule should come into play most usually after other tools of statutory construction have been exhausted. 508 U.S., at 239-40. Thus in *Smith*, the Court decided that "use [of] a firearm" included the use of it for barter, declining to use the Rule of Lenity as the basis for a more narrow reading. The Court reached its conclusion because the government's proposed construction fell "squarely within the common usage and dictionary definitions" of the statutory phrase and because "Congress affirmatively demonstrated that it meant to include transactions" like the defendant's in that case. 508 U.S., at 240.

The government's proposed broad reading of § 924(c)(1) in the instant case meets neither of these conditions. Congress did not affirmatively demonstrate that "carry a firearm" meant to transport it in a vehicle. Moreover, as argued above, the "transportation" interpretation of § 924(c)(1) would fall outside the common usage and most relevant dictionary meanings of "carry a firearm."

Moreover, in describing why the Rule of Lenity should not apply in *Smith*, the Court in effect offered justifications for why it should apply in the present case. The Court noted that "the *mere possibility* of articulating a narrower construction . . . does not by itself make the rule of lenity applicable." 508 U.S., at 239 (emphasis added). The Court also observed that "the rule of lenity 'cannot dictate an *implausible* interpretation of a statute, nor one *at odds* with the generally accepted contemporary meaning of a term.'" *Id.*, at 240 (quoting *Taylor v. United States*, 495 U.S. 575, 596 (1990)) (emphases added). The Court held that a definition of "use a firearm" that did not

include bartering would "*do[] violence* not only to the structure and language of the statute but its purpose as well." 508 U.S., at 240.

These descriptions of when the Rule should not apply strengthen the case for its application here. There can be no question, given the strong arguments supporting an "on the person" construction of "carry a firearm," that there is more than a "mere possibility" of articulating a narrow construction of the phrase. Similarly, no one could reasonably argue that a definition that fits squarely within the most relevant dictionary meaning is "implausible" or "at odds" with generally accepted meanings. And as demonstrated above, a narrow reading of "carry a firearm" hardly "does violence" to the structure, language, and purpose of § 924(c)(1). On the contrary, a narrow reading best reflects an attention to these touchstones of statutory interpretation.

IV. CONCLUSION

For the foregoing reasons, the judgments of the Courts of Appeals should be reversed.

Respectfully submitted.

DANIEL KANSTROOM
Counsel of Record
KENT GREENFIELD
Boston College Law School
885 Centre Street
Newton, MA 02159
(617) 552-0880
(617) 552-3167

DAVID PORTER
Co-Chair, Amicus Committee
NACDL
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

KYLE O'DOWD
General Counsel
FAMM
1612 K Street, N.W., Suite 1400
Washington, D.C. 20006
(202) 822-6700

APPENDIX

S. 1612 passed the Senate on October 3, 1996 in the following, simplified form:

> " . . . (a) In General.--Sections 924(c)(1) and 929(a)(1) of title 18, United States Code, are each amended by striking "uses or carries" and inserting "possesses."

"A bill to broaden the scope of certain firearms offenses, and for other purposes," 142 Cong. Rec. S12390 (daily ed. October 3, 1996) (other text of bill omitted).

S. 191, a descendant of S.43 proposed by Sen. Helms, passed the Senate in November 1997 in the following (excerpted) form:

> (a) IN GENERAL- Section 924(c) of title 18, United States Code, is amended--
> (1) by striking '(c)' and all that follows through '(2)' and inserting the following:
> '(c) POSSESSION OF FIREARM DURING COMMISSION OF CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME-
> '(1) TERM OF IMPRISONMENT-
> '(A) IN GENERAL- Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which a person may be prosecuted in a court of the

United States, uses or carries a firearm, *or who, in furtherance of any such crime, possesses a firearm,* shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--
'(i) be sentenced to a term of imprisonment of not less than 5 years . . . .

"The Gun Act of 1997", 143 Cong. Rec. S12712 (daily ed. November 13, 1997) (emphasis added).

Legislation proposed in the House of Representatives has similarly been aimed at "possession," deriving from the apparent understanding that "carry" is a much narrower concept. *See* H.R. 424, "A bill to provide for increased mandatory minimum sentences for criminals possessing firearms, and for other purposes," one version of which, introduced on January 16, 1997, provided in relevant part:

Section 924(c)(1) of title 18, United States Code, is amended to read as follows:

"(c)(1)(A) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, possesses a firearm shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-
"(i) be imprisoned not less than 10 years;
"(ii) if the firearm is discharged during and

in relation to the crime, be imprisoned not less than 20 years; and
"(iii) if the death of a person results, be punished by death or by imprisonment for life . . ."

A later version, which was reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed on October 24, 1997, provided that:

Section 924(c) of title 18, United States Code, is amended- . . .
(2) by striking paragraph (1) and inserting the following:
"(1) A person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States-
(A) possesses a firearm in furtherance of the crime, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 10 years;
(B) brandishes a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 15 years; or
(C) discharges a firearm, shall, in addition to the sentence imposed for the crime of violence or drug trafficking crime, be sentenced to imprisonment for 20 years . . ."

Report No. 105-344.